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No. 99-1344

In the Supreme Court of the United States

FRANCIS X. LIVOTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in granting an upward departure on the ground that petitioner's offense conduct was atypical, taking it out of the heartland of similar offenses.

2. Whether the civil rights Sentencing Guideline's six-level enhancement for acts committed by public officials or under color of law, Sentencing Guidelines § 2H1.1(b)(1), applies where the jury found beyond a reasonable doubt as an element of the offense that petitioner acted under color of law.

3. Whether the district court erred in applying the obstruction of justice enhancement, Sentencing Guidelines § 3C1.1, because during the prosecution of the instant offense, petitioner committed perjury before the grand jury in state proceedings and petitioner called witnesses to offer perjured testimony on his behalf in the federal proceedings.

4. Whether the district court correctly applied the involuntary manslaughter Guideline, Sentencing Guidelines § 2A1.4, after finding that petitioner recklessly caused his victim's death.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 196 F.3d 322. The opinion of the district court (Pet. App. C1-C37) is reported at 22 F. Supp. 2d 235.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1999. The petition for a writ of certiorari was filed on February 3, 2000. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was

convicted of depriving a citizen of constitutional rights under color of law, in violation of 18 U.S.C. 242. He was sentenced by the district court to 90 months' imprisonment to be followed by three years' supervised release. The court of appeals affirmed.

1. In the early hours of December 22, 1994, petitioner was on duty in the South Bronx as an officer with the New York City Police Department (NYPD). Pet. App. A2. Petitioner stopped to speak with other officers in a different patrol car near the home of the Baez family. *Id.* at A2, C4. While petitioner and his colleagues were speaking, Anthony Baez and his three brothers were playing football in the street. Two errant passes struck the officers' vehicles, angering petitioner, who cursed the brothers and ordered them to leave the area, go to a park, or go home. *Id.* at A2, C5. The brothers continued to play football, but in the opposite direction in order to avoid hitting the officers' vehicles. *Ibid.* Petitioner then exited his vehicle, cursed the brothers, and challenged them to a fight. *Id.* at A2-A3, C6. David Baez announced that he would not go home. Petitioner placed David in handcuffs and put him in the back of his patrol car. *Id.* at A3, C6. After Anthony protested David's arrest, petitioner attempted to arrest Anthony, but Anthony refused to put his arms behind his back to be handcuffed and, instead, held his arms to his chest. *Id.* at A3, C7.

In response, petitioner placed Anthony in a "choke hold," a method of restraint that was forbidden by NYPD training and policy, in which an individual's neck is clamped between the officer's forearm and bicep, cutting off the individual's airway and blood circulation to the brain. Pet. App. A3-A4, C10. Anthony's father and another brother pleaded with petitioner to stop choking Anthony, informing petitioner that Anthony

had asthma; but petitioner continued the choke hold even though Anthony at no point resisted him. *Id.* at A3, C7. After choking Anthony for at least one minute, petitioner lowered his limp body to the ground, where Anthony remained motionless while officers handcuffed him and carried him to a patrol car. *Id.* at A3, C8. Anthony was transported to the hospital where he was pronounced dead. *Id.* at A3, C9.

2. Petitioner was indicted by a state grand jury and tried for criminally negligent homicide. Pet. App. F2. He was acquitted in a state court bench trial. *Id.* at F15.

3. Petitioner was then tried in federal court where a jury found him guilty of depriving Anthony Baez of his civil rights, in violation of 18 U.S.C. 242. Pet. App. C2. The district court sentenced petitioner to 90 months' imprisonment to be followed by three years' supervised release.

a. The court applied the Guideline for "Offenses Involving Individual Rights," which incorporates in the circumstances present here the base offense level applicable to the underlying conduct. Sentencing Guidelines § 2H1.1(a). The court found that petitioner's underlying conduct was reckless and constituted involuntary manslaughter, requiring a base offense level of 14, under Sentencing Guidelines § 2A1.4(a)(2). Pet. App. C14-C25. The court based its determination on a finding that the evidence established that the primary cause of Baez' death was petitioner's proscribed choke hold, and not, as petitioner argued, an asthma attack or Baez' weight. *Id.* at C9-C14. Thus petitioner recklessly caused Baez' death. *Id.* at C19-C25.

b. The court then added six levels as required by Sentencing Guidelines § 2H1.1(b)(1) because petitioner acted under color of law and as a public official. Pet.

App. C25-C27. The district court rejected petitioner's argument that because 18 U.S.C. 242 requires as an element of the offense that the defendant acted under color of law, to apply the enhancement would result in impermissible double counting. Pet. App. C26. The court explained that Guideline § 2H1.1

> applies to all civil rights violations, whether or not they are committed by public officials or under color of law. * * * Thus, the 'under color of law' element is not a component of the base offense level under § 2H1.1. As a result, application of the six-level enhancement under [§] 2H1.1 does not constitute impermissible double counting.

Pet. App. C26. In any event, the court found that petitioner was also a public official, which is not an element of the offense of conviction, and that finding provided an alternative basis for the enhancement. *Id.* at C27 n.10. The enhancement resulted in an offense level of 20.

c. The court next applied the two-level upward adjustment for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1. Pet. App. C27-C37. That Guideline applies if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Sentencing Guidelines § 3C1.1. Application Note 3 of that Guideline sets forth a non-exhaustive list of examples of obstruction that includes committing, suborning, or attempting to suborn perjury.

The district court found by clear and convincing evidence that petitioner had committed perjury before the grand jury in the state proceedings. Pet. App. C28-C29 & n.11. The court concluded that this perjury could

be considered part of the "instant offense" because petitioner's testimony before the state grand jury was "tied to" the offense of conviction, as that testimony ultimately obstructed and impeded the federal investigation. *Id.* at C30-C33 (citing cases from the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits).

The district court found that petitioner also obstructed justice by knowingly presenting the perjured testimony of fellow officers at his federal trial. Pet. App. C33-C37. The obstruction of justice adjustment resulted in an offense level of 22.

d. The district court denied petitioner's motion for a downward departure. Pet. App. C37, E9, E41. Petitioner sought a downward departure on three grounds: the victim's conduct, the fact that petitioner endured successive and burdensome state and federal prosecutions, and the potential for prison abuse. The court rejected the first ground as a basis for departure, finding it "particularly inapplicable" here where "the victim committed no criminal act and never threatened the defendant." *Id.* at E41. Exercising its discretion, the district court declined to depart downward for the other two reasons but stated that "both of those arguments will be taken into account in fashioning the appropriate sentence." *Ibid.*

e. The court granted the government's motion for an upward departure because the extraordinary circumstances of the case took it outside the heartland of typical cases contemplated by the Guidelines. See Sentencing Guidelines § 5K2.0 (permitting departures when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission * * * that should result in a sentence different from that described"); 18 U.S.C. 3553(b). See also Pet. App.

E10, E43. The court concluded that a four-level upward departure was warranted because petitioner had no probable cause to arrest the Baez brothers; petitioner acted without any real provocation; and petitioner deliberately disregarded repeated specific and personal admonitions from the NYPD regarding (a) petitioner's prior use of excessive force and unnecessary confrontations with civilians, and (b) the dangers of the forbidden choke-hold restraint. Pet. App. E43-E45. See also *id.* at A11-A12, A15-A17. The court limited the upward departure to four levels because Baez resisted petitioner's attempt to handcuff him, and because of petitioner's long service in the NYPD, his prior unsuccessful prosecution in state court, his risk of abuse in prison as a former police officer, and the NYPD's failure to remove him from the force earlier in light of his repeated incidents of excessive force. *Id.* at E45-E48.

f. The court granted the government's motion for an increase in petitioner's criminal history category because reliable information indicated that petitioner's criminal history category did not adequately reflect the seriousness of his past criminal conduct pursuant to Sentencing Guidelines § 4A1.3. Pet. App. E9-E10, E41-E43. Petitioner's criminal history category would have been II on the basis of his prior conviction for assault and reckless endangerment of a civilian in the course of arrest. *Id.* at E9. The district court increased his criminal history category to III because it found that petitioner had engaged in prior similar criminal conduct that did not result in conviction, namely assaulting two men in the course of another arrest. *Id.* at E41-E42.

An offense level of 26 combined with petitioner's adjusted criminal history category of III called for a sentence of 78 to 97 months' imprisonment under the

Guidelines. The court imposed a sentence of 90 months' imprisonment, declining to sentence at the top of the range after taking into account the statements of petitioner and his counsel at sentencing. Pet. App. E48-E49.

4. On appeal, petitioner unsuccessfully challenged many aspects of his trial and sentence. Pet. App. A1-A18. The court of appeals rejected petitioner's argument that the district court erred when it applied the involuntary manslaughter Guideline because the district court's finding that petitioner caused Baez' death was not clearly erroneous. *Id.* at A10. The court of appeals did not reach petitioner's claim that it was improper to apply the six-level "under color of law" enhancement of Sentencing Guidelines § 2H1.1(b)(1), in cases where acting under color of law is an element of the statutory violation, because it concluded that the enhancement would have been required on the independent ground that petitioner was a "public official" at the time of his acts. Pet. App. A11. The court of appeals did not reach petitioner's claim that the two-level adjustment for obstruction of justice was not available for petitioner's obstruction of the state investigation, because the court concluded that the adjustment was triggered by petitioner's conduct during the federal trial, in which he called fellow officers to testify knowing that they would perjure themselves. *Id.* at A10.

The court of appeals rejected petitioner's argument that the district court abused its discretion in increasing his criminal history category. Pet. App. A11-A12. Finally, the court of appeals concluded that the district court acted within its discretion in determining that this case was sufficiently atypical to warrant an upward departure under Sentencing Guidelines

§ 5K2.0, expressly approving the three grounds on which the district court relied and concluding that the degree of departure was reasonable. Pet. App. A12-A17.

ARGUMENT

Petitioner raises fact-specific claims of error in the district court's application of the Sentencing Guidelines to his case. Petitioner does not contend that the court of appeals' decision conflicts with the decisions of this Court or any court of appeals. To the extent any general issues of interpretation or application of the Sentencing Guidelines are implicated, those issues are best addressed by the Sentencing Commission rather than this Court. See *Braxton* v. *United States*, 500 U.S. 344 (1991). Accordingly, petitioner's claims are without merit and do not warrant review.

1. Petitioner first contends (Pet. 9-19) that the district court erred in finding this case atypical and imposing a four-level upward departure from his offense level. Petitioner's objections to the district court's decision to grant an upward departure on the particular facts of this case were properly resolved by the court of appeals and present no legal question warranting review by this Court. See *Koon* v. *United States*, 518 U.S. 81, 99 (1996) ("[A] district court's departure decision involves the consideration of unique factors that are little susceptible . . . of useful generalization.") (internal quotation marks omitted).

A departure from the sentencing range is permitted when the facts of a particular case take it outside the "heartland of typical cases" contemplated by the relevant Guideline. *Koon*, 518 U.S. at 94; Sentencing Guidelines Ch. 1 Pt. A(4)(b). Because district courts have an institutional advantage in the fact-specific task

of distinguishing typical from atypical cases, this Court has held that "[a] district court's decision to depart from the Guidelines * * * will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Koon*, 518 U.S. at 98. See also *id.* at 100.

In this case, the court of appeals properly declined to second-guess the district court's finding that the degree of petitioner's recklessness in causing the death of an innocent civilian made this case atypical of other cases of involuntary manslaughter under color of law. Pet. App. A14-A17. Petitioner attempts to portray the district court as having made the legal error of considering whether this case was atypical of civil rights cases *generally* as opposed to cases of involuntary manslaughter under color of law, by quoting one statement in the sentencing transcript out of context. See Pet. 9. The court of appeals, however, properly understood the district court to have concluded that petitioner's case was atypical of police excessive force cases resulting in death.[1] Pet. App. A14-A17, E43-E45.

In particular, the district court concluded that, compared to typical excessive force cases, the level of petitioner's culpability in creating and escalating the confrontation that led to the use of force was atypical. The district court noted that this was not a case in

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[1] The district court did not, as petitioner asserts (Pet. 18-19), base its upward departure on the mere fact that the excessive force resulted in death. The statement that petitioner cites was made in the context of describing why the court chose a four-level upward departure rather than a larger or smaller departure. Pet. App. E47-E48. The court simply observed that because this case resulted in death, it was more serious than the beating case in *Koon* and, therefore, "[s]uch a crime warrants a significant sentence." *Id.* at E48.

which a lawful arrest was followed by illegal resistance that led to a lawful use of force that subsequently became excessive. Pet. App. E43.[2] In this case, petitioner's misconduct was responsible for each step of the escalation, from the illegal arrest of David Baez, to the illegal arrest of Anthony Baez, to petitioner's exaggerated response to the perceived affront to his authority that led to Anthony's death. *Id.* at E43-E44. Petitioner's case was also atypical in the unusual degree to which he had been personally warned by the NYPD about his prior violent confrontations with civilians.[3] *Id.* at E44-E45.

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[2] Petitioner argues (Pet. 12) that lack of probable cause is not a basis for departure because it is within the heartland of the civil rights and involuntary manslaughter Guidelines, citing *United States* v. *McDermott*, 918 F.2d 319 (2d Cir. 1990), cert. denied, 500 U.S. 904 (1991), and *United States* v. *Langer*, 958 F.2d 522 (2d Cir. 1992). Those cases merely stand for the proposition that arrest or detention without probable cause can constitute a violation of criminal civil rights laws. In neither of those cases, which concerned convictions, not sentencing, did the Second Circuit hold that a lack of probable cause is within the heartland of civil rights offenses or that a lack of probable cause could never be a basis for upward departure. Petitioner also provides no support for his contention (Pet. 11-13) that a lack of probable cause and a lack of victim provocation are identical or fall within the heartland of an involuntary manslaughter offense as a matter of law. In this case, the district court explained why both these factors made petitioner's offense atypical. Pet. App. E43-E44.

[3] Contrary to petitioner's contention (Pet. 15-18), there was no double counting of petitioner's awareness of the NYPD's policy on choke holds in calculating the offense level and determining the upward departure. As the court of appeals explained, the district court relied on the fact that petitioner had deliberately disregarded personalized warnings about his violent behavior, along with the clear NYPD policy on choke holds, as a basis for upward departure. Pet. App. A16-A17, E44-E45; *Koon*, 518 U.S. at 94

2. Petitioner next argues (Pet. 19-21) that the district court erred in applying the specific offense characteristic subsection of the civil rights Guideline, which states that "[i]f (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by 6 levels." Sentencing Guidelines § 2H1.1(b)(1). He claims that applying the provision constituted impermissible "double counting" because punishment for acting under color of law "is already built into the base level of the civil rights sentencing guideline" when the underlying offense requires proof that petitioner acted under color of law. Pet. 20.

The court of appeals did not address this argument because it concluded that petitioner also qualified for the enhancement as a "public official," which is not an element of a Section 242 offense. See Pet. App. A11. Thus, even under petitioner's reasoning, a six-level enhancement for acting as a public official would not constitute impermissible double counting. Petitioner does not dispute the court of appeals' factual or legal conclusion on this point.

In any event, as the district court explained, Pet. App. C26-C27, petitioner is wrong in his assertion that punishment for the "color of law" characteristic of his crime is already "built into" the base offense level dictated by the first subsection of the civil rights Guideline, Sentencing Guidelines § 2H1.1(a). The fact that color of law is an element of the offense of conviction does not mean that that factor is incorporated into the base offense level in the Guidelines; the structure of the

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(district court may depart based on aggravating circumstances "of a kind *or degree* not adequately taken into consideration by the Commission") (emphasis added).

civil rights Guideline itself leads to the opposite conclusion. Many offenders sentenced under the civil rights Guideline have not acted under color of law or as public officials.[4] For that reason, the first subsection of the guideline creates a base level of punishment applicable to all civil rights violations; the specific offense characteristics subsection then enhances that level by six to provide additional punishment when those violations occurred through an abuse of official authority. See *Koon*, 518 U.S. at 101-102 (discussing application of six-level enhancement to a Section 242 case under predecessor civil rights Guideline). Therefore, the double counting cases petitioner cites (Pet. 21) are simply inapposite.

3. The court of appeals likewise did not address petitioner's contention (Pet. 21-24) that the district court erred in finding an obstruction of justice in the "instant offense," Sentencing Guidelines § 3C1.1, for conduct that occurred during the state investigation of his crime, prior to commencement of any federal inquiry. The court of appeals did not reach this issue because it relied on the district court's alternative ground for the enhancement, that petitioner knowingly presented perjured testimony from witnesses during his federal trial, a ground not challenged by petitioner. See Pet. App. A10-A11, C33-C37. Thus, the proper interpretation and scope of the obstruction provision is not presented in this case.

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[4] For example, the Guideline applies to violations of 18 U.S.C. 241 (1994 & Supp. IV 1998), which covers private conspiracies against civil rights and does not require that the acts be committed by public officials or under color of law. See Sentencing Guidelines § 2H1.1 Statutory Provisions.

4. Petitioner's final claim (Pet. 24-29) is that the district court should not have applied the involuntary manslaughter Guideline to his case because he did not cause Baez' death. The district court found otherwise, and the court of appeals correctly concluded that the district court's finding was not clearly erroneous.[5] This factual dispute presents no question warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Moreover, if the district court had concluded petitioner's choke hold was not the primary cause of Baez' death, the appropriate Guideline would likely have been that for aggravated assault, which would have led to a higher base offense level than petitioner received under the involuntary manslaughter Guideline. Compare Sentencing Guidelines § 2A2.2 (aggravated assault Guideline providing for a base offense level of 15, with enhancements of up to six levels depending on the extent of the victim's injuries) with Sentencing Guidelines § 2A1.4 (involuntary manslaughter Guideline providing for a base offense level of 14 if the conduct was reckless). See also *Koon*, 518 U.S. at 101 (applying aggravated assault Guideline in police excessive force case).